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# In The Supreme Court of The United States

October Term, 1980

FEDERAL ELECTION COMMISSION
and
NATIONAL REPUBLICAN SENATORIAL COMMITTEE,
Petitioners,

*vs.*

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED FOR REVIEW

1. Has the conclusion of the 1980 Congressional elections rendered this case moot?
2. Must the courts defer to the Federal Election Commission's interpretation of 2 U.S.C. §441a(d), when its interpretation conflicts with the plain language and purpose of the provision, and when the basis of that interpretation is neither clearly nor consistently stated?
3. May 2 U.S.C. §441a(d), which confers special spending authority on State party committees, be construed to allow those committees to transfer that authority to another political committee through the device of "agency" agreements?
4. Is the prohibition on "agency" agreements an impermissable infringement on the First Amendment rights of a political committee seeking to assume the limits expressly delegated to State committees under 2 U.S.C. §441a(d)?

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## ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

### Respondent's Brief in Opposition

The Respondent, Democratic Senatorial Campaign Committee, respectfully requests that this Court deny the petitions for writ of certiorari, filed by the Federal Election Commission and by the National Republican Senatorial Committee, seeking review of the United States Court of Appeals for the District of Columbia's opinion in this case.

### OPINIONS BELOW

The opinion of the Court of Appeals and the opinion of the United States District Court for the District of Columbia, not yet reported, appear in the Appendix hereto. The Appendix also contains the certification of the vote of the Federal Election Commission.

### JURISDICTION

The Judgment of the Court of Appeals was entered October 9, 1980. A petition for rehearing, application to recall mandate, and suggestion for rehearing *en banc* were denied on October 11, 1980. Jurisdiction of this Court has been defeated by virtue of the occurrence of events mooting this action, specifically, the conclusion of the 1980 Congressional elections over which this controversy originally arose.

## STATEMENT OF THE CASE

Section 441a(d) of the Federal Election Campaign Act ("FECA"), as amended, 2 U.S.C. §441a(d), grants special spending authority in general election campaigns for the United States Senate to certain specifically defined "political committees".[1] Those committes are (1) "the national committee of a political party" and (2) "a State committee . . . of a political party, including any subordinate committee of a State committee." 2 U.S.C. §441a(d)(3). Each of these named party committees is allowed to spend the greater of $20,000, or "2 cents multiplied by the voting age population of the State", on behalf of their party's candidates for the United States Senate. 2 U.S.C. §441a(d)(3). The spending power conferred by §441a(d) on these committees exceeds that allowed other types of political committees or individuals.[2]

Beginning in 1976, pursuant to regulations promulgated by the Federal Election Commission ("FEC"),[3] the national

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[1] The Federal Election Campaign Act of 1971 ("the Act" or "FECA"), P. L. 92-225, 86 Stat. 3, as amended by the Federal Election Campaign Act Amendments of 1974, P. L. 93-443, 88 Stat. 1263; as amended by the Federal Election Campaign Act Amendments of 1976, P. L. 94-283, 90 Stat. 475; as amended by the Federal Election Campaign Act Amendments of 1977, P. L. 95-216, 91 Stat. 1655; and as amended by the Federal Election Campaign Act Amendments of 1979, P. L. 96-187, 93 Stat. 1339.

[2] Individuals are subject to the following limits: (1) $1,000 per candidate per election; (2) $5,000 to any "political committee" in a calendar year; (3) $20,000 to the political committees "established and maintained" by a national political party; and (4) a $25,000 limit overall on all contributions made in a calendar year. *See* 2 U.S.C. §§ 441a(a)(1), 441a (a)(3). Political committees may contribute $1,000 to a candidate; "multi-candidate" committees may contribute $5,000. 2 U.S.C. §§441a(a)(2), 441a(a)(4).

[3] *See* 11 C.F.R. §110.7(a)(4). Until this litigation, when the FEC elected to disavow its prior interpretation before the Court of Appeals, that agency had consistently interpreted this regulation to authorize "agency" agreements between the national committee and any "agent". *See* FEC Advisory Opinion 1976-108 (1977).

committee of the Republican Party, the Republican National Committee, designated the National Republican Senatorial Committee ("NRSC") as its "agent" under § 441a(d). The NRSC is a "political committee" registered with the Federal Election Commission and established by Republican members of the U.S. Senate to support incumbent and non-incumbent Republican Senate candidates. The "agency" arrangement in question consisted, simply, of the NRSC's assumption of the national committee's limits, and its expenditure of its own funds under that limit.[4]

In 1978, State committees of the Republican Party also designated the NRSC as their "agent" under § 441a(d) and thus purported to transfer their spending authority under that section to the NRSC. Once again, while purportedly an "agent", NRSC in fact was the "principal", spending its own money as it saw fit under the limit expressly delegated under § 441a(d) to the State committees. Unlike the case of the national committee "agency" arrangements, no Commission regulation or statutory provision expressly authorizes this agreement with State committees.

By virtue of this "agency" device, the NRSC was positioned to amass, for its own account, the total composite spending ceiling of $3,487,020.80 available to all 34 Republican State committees with Senate races in their States in 1980.[5] The result was extraordinary and unmatched spending power by a single committee in the 1980 Congressional races. For example, in California the NRSC had available a limit of $485,024.00 pursuant to "agency" arrangements with the State committee; in New York, the comparable limit was $379,717.12.[6]

In a complaint filed with the Federal Election Commission on May 9, 1980 and designated by the FEC as Matter Under Review ("MUR") No. 1234, the Democratic Senatorial Compaign Committee ("DSCC") challenged the NRSC's

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[4] For this reason, the Court of Appeals correctly pointed out that the "agency" label was "somewhat misleading". *See* App., *DSCC v. FEC*, at A13.

[5] *See* App., *DSCC v. FEC*, at A4.

[6] *See* App., *DSCC v. FEC*, at A4.

"agency" agreements with State party committees. DSCC did not challenge NRSC's "agency" agreement with the national committee which, in the view of both DSCC and the FEC, had the special sanction of a Commission regulation reviewed by Congress under the Act's one-house veto provision, 2 U.S.C. §438(d). After receiving a response from the NRSC, the FEC General Counsel on July 8, 1980 issued his "First General Counsel's Report" to the Commission, which recommended that the Commission find no "reason to believe" that NRSC's "agency" arrangement with State committees violated §441a-(d). On July 10, 1980, the Commission itself considered MUR 1234 and by a 6-0 vote it found no reason to believe that the FECA had been violated.[7] The Commission did not adopt the First General Counsel's Report, and indeed, gave no reasons whatsoever to explain its actions.

On July 30, 1980, DSCC filed a petition for review of the FEC's actions in the District Court pursuant to 2 U.S.C. §437g(a)(8). That petition sought a declaration that the dismissal of DSCC's administrative complaint was contrary to law because §441a(d) does in fact prohibit the NRSC "agency" arrangements with State committees. The parties stipulated to an expedited schedule in which the matter was to be resolved by cross-motions for summary judgment. The matter was heard by District Judge June L. Green on August 22. Judge Green rendered a decision in favor of the FEC on August 28. The District Court upheld the FEC's interpretation of §441a-(d), and dismissed this action, on the grounds that the agency's finding was not "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."[8]

On September 4, 1980, DSCC docketed its appeal of the District Court decision in the United States Court of Appeals for the District of Columbia Circuit. On September 9, 1980, NRSC moved to intervene, and that motion was granted on September 22. Following full briefing and oral argument on an expedited schedule, the Court of Appeals reversed the District

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[7] *See* App. at C1.

[8] *See* App., *Democratic Senatorial Campaign Committee v. Federal Election Commission*, No. 80-1903, at B4.

Court and held that the FEC's interpretation authorizing the challenged agency agreements was "contrary to law". The Court of Appeals specifically held that the "clear language" of §441a(d) precluded the challenged "agency" arrangements, whereby NRSC assumed the limits specifically allocated by Congress to other, named party committees.[9] Judge Wilkey dissented. On October 10, NRSC filed a petition for rehearing with a suggestion for rehearing *en banc* and an application to recall the mandate. On October 11, the Court of Appeals denied both these motions.[10]

On October 16, NRSC applied to the Chief Justice of the Supreme Court for an order to stay enforcement of the Court of Appeals decision, pending disposition of its petition for a writ of certiorari. On October 16, the Chief Justice entered an order temporarily staying the decision below. Following a motion by DSCC on October 17, the full Court refused to vacate this temporary stay on October 21. With the election only days away, and with the NRSC's use of "agency" arrangements leading to the expenditure of thousands of additional dollars on behalf of Republican Senate candidates, DSCC filed a motion for "expedited consideration" on October 27. The Chief Justice denied this motion as "moot" on October 28. Thus, the temporary stay entered by the Chief Justice on October 17 remains in effect. The FEC then filed a petition for a writ of certiorari on December 10, 1980, and the NRSC filed the same on January 6, 1981.

## REASONS WHY THE WRIT SHOULD BE DENIED

### Summary of Argument

This case has been mooted by the conclusion of the 1980 Congressional elections, in the course of which NRSC implemented its "agency" agreements with State committees and made all the expenditures challenged by Respondent. There is thus no continuing case or controversy justifying the exercise of jurisdiction by this Court.

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[9] *See* App., *DSCC v. FEC*, at A14.

[10] *See* App. at E1, E2.

In the event that this Court finds that this case is not moot, it should affirm the Court of Appeals decision holding that NRSC's "agency" agreements with State committees violate 2 U.S.C. §441a(d). Deference to the agency decision, which was the basis of the District Court opinion, is not appropriate here, since that decision cannot be reconciled with the plain language of 2 U.S.C. §441a(d) and lacks any reasoned foundation whatever. The Court of Appeals was correct in making an independent examination of the legality of "agency" agreements under §441a(d), and in concluding that those agreements, whereby NRSC assumed the expenditure limit allocated by Congress to State committees, were in violation of that provision.

NRSC's assertion of constitutional protection for "agency" agreements must likewise be rejected. NRSC does not challange the constitutionality of §441a(d) *per se*, but instead seeks constitutional protection for its attempt to rewrite the plain language of the provision to suit its own purposes. In any event, other vehicles are available to NRSC in associating with State party committees under §441a(d), and thus NRSC's First Amendment rights are not burdened in any constitutionally cognizable way by a prohibition on "agency" agreements. To the degree that §441a(d) does burden NRSC's associational rights, it does so only minimally, and the burden is clearly outweighed by the legitimate State interest, expressed in §441a(d), in providing for active State and local political party participation in the federal elective process.

## Argument

### I. This Case Is Moot Because The 1980 Congressional Elections Have Passed, And No Effective Relief Can Now Be Granted.

With the passing of the Congressional elections of 1980, this case has been mooted. The expenditures challenged in the proceedings below have been made; the resulting harm to DSCC is complete, and no effective relief can be granted now

by this Court. Thus the "live controversy" required for review by this Court is not present, *Sosna v. Iowa*, 419 U.S. 393, 402 (1975), and under the established principles of *United States v. Munsingwear*, 340 U.S. 36 (1950), Respondent respectfully requests that this Court vacate the judgment of the Court of Appeals and instruct the District Court to dismiss the action.

This Court has held that where a challenge to an election law is unique to a particular party in a particular election, passage of the election in question eliminates the live controversy required for review. In *Brockington v. Rhodes*, 396 U.S. 41 (1969), the Court refused to address the constitutional challenge brought by a Congressional candidate to certain State statutory restrictions on independent candidacies. Instead, in the absence of any indication that the candidate petitioner would run for office again, or was representing the interests of any other class of similarly situated candidates or voters, the Court held that ". . . the case is moot because the Congressional election is over." *Id.*, at p. 43. A similar result was reached in *Keane v. National Democratic Party*, 475 F.2d 1287 (1973), where National Party delegates elected under State law challenged the refusal of the National Party to seat them at the National Convention. The passing of the convention then mooted the case, and required its dismissal, before it could be reviewed by this Court.

Here, Respondent brought a challenge to avoid specific harm to specific candidates in the recently concluded Congressional elections of 1980. Respondent did not bring this action in the name of any other parties; nor did any other parties attempt to intervene on the same side as Respondent on the basis of an identical interest in the outcome. This is not therefore one of those election law cases, such as those involving "exclusionary voting and candidate qualifications", *Storer v. Brown*, 415 U.S. 724, 730 (1974), where an identifiable class of other similarly affected individuals or entities would be sure to bring the same action in the future. *See*, e.g. *American Party of Texas v. White*, 415 U.S. 767 (1974); *Dunn v. Blumstein*, 405 U.S. 330 (1972). Moreover, as the instant case establishes, this is the type of challenge which, if brought in the

next election cycle, can be expected to reach this Court speedily for resolution.[11] The doctrine "capable of repetition, yet evading review" does not therefore save this case from a mootness determination. *DeFunis v. Odegaard*, 416 U.S. 312, 319 (1974).

Also significant is Petitioner NRSC's attempt to have this case decided now on constitutional grounds. Proceedings rendered "moot" by events are inappropriate vehicles for the resolution of constitutional issues. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936) (Brandeis, J., concurring). As this Court has stated in applying *Ashwander* principle in another context: "Constitutional adjudication being a matter of 'great gravity and delicacy', we base our refusal to pass on the merits on 'the policy rules often invoked by the Court "to avoid passing prematurely on constitutional questions."'" (citations omitted), *Kremens v. Bartley*, 431 U.S.119, 128 (1977); *See also Franks v. Bowman Transportation Company*, 424 U.S. 747 (1976); *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee*, [1980] Fed. Elec. Camp. Fin. Guide (CCH) ¶9107. These concerns are especially significant where, as here, the constitutional issues were raised late in the proceedings below, shortly before decision by the Court of Appeals, and were pressed in summary fashion. This Court therefore has been deprived of the valuable guidance of considered judgments below on these same constitutional issues.

## II. The Federal Election Commission's Determination In This Case Was Contrary To Law And Not Entitled To Deference Upon Review.

Petitioner FEC, joined by Petitioner NRSC, seeks reversal of the Court of Appeals decision on the basis of the "defer-

[11] The FECA expressly provides for expedited judicial review of challenges to FEC dismissals of administrative complaints. 2 U.S.C. §437g(a)(10). This case was placed on expedited schedule; thus, the DSCC's complaint was filed May 9, 1980, and was reviewed by the FEC, District Court and the Court of Appeals within five months.

ence" allegedly owed its construction of § 441a(d). The protection claimed by the agency under "deference" principles would be virtually absolute; no attempt whatever is made in FEC's petition to this Court to review its reasoning in this case and to vindicate that reasoning, on its merits, as warranting the deference sought.

This Court has made clear, however, that in review of agency decisions, courts must evaluate "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . . ." *Adamo Wrecking Company v. United States*, 434 U.S. 275, 287 n. 5 (1978), (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). It has been recognized that this "power to persuade" is lacking where the agency, as is the case here, offered no discernible or consistent rationale for its decision. *Securities Exchange Commission v. Sloan*, 436 U.S. 103, (1978). Moreover, the existence of prior "consistent" decision does not relieve this Court of the "responsibility to determine whether that practice is consistent with the agency statutory authority."[12] *Id.*, at p. 118.

As the Court of Appeals has painstakingly showed, the decisions of the FEC on the issue presented here exhibited a "troubling absence of consistent reasoning." Indeed the positions taken by that agency in this case alone changed at

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[12] *See* Pet. FEC Br. at p. 9, where it cites its "consistent" interpretation of §441a(d) on this issue. The alleged "consistency" of the FEC's decision on this issue rests on two prior administrative determinations decided only three years ago. *In re National Republican Senatorial Committee*, Federal Election Commission Matter Under Review 820; *In re National Republican Senatorial Committee*, Federal Election Commission Matter Under Review 780. These decisions were however, inconsistent one with the other; and neither can be reconciled with the rationale advanced by the FEC in this case. *See* App. *DSCC v. FEC*, at pp. A9-11. Thus the "consistency" alleged by the FEC is merely one of result, not of considered viewpoint or analysis.

each stage of the proceedings below.[13] Emerging from the erratic course of its reasoning was a result which defies the "clear language" of §441a(d), as well as its statutory context and legislative history.[14] Deference in these circumstances is unquestionably inappropriate and unjustified.

Petitioner FEC, in particular, seeks to evade the consequences of its performance in this case by misconstruing the applicable standard of review. It insists that in cases involving review of its determinations, the courts have consistently held an "arbitrary and capricious" standard.[15] Respondent submits that even under this standard, the agency's continually shifting reasoning, in the face of clear statutory language to the contrary, would not be entitled to deference.[16] Yet those same cases cited by Petitioner FEC also establish that its action may be overturned as "contrary to law", namely, as being in direct conflict with the plain requirements of the statute. *Hampton v. Federal Election Commission*, Fed. Elec. Camp. Fin. Guide (CCH) ¶9036 at 50, 439-40 (D.D.C. 1977), *aff'd* No. 77-1546 (D.C. Cir. July 21, 1978) (unpublished opinion) (FEC action should be set aside if it "was arbitrary or capricious, was in abusive discretion or was otherwise contrary to law"); *In re Carter-Mondale Reelection Committee, Inc.*, [1980] Fed. Elec. Camp. Fin. Guide (CCH) ¶9132 (D.C. Cir. Sept. 12, 1980) (the standard of review was "whether the FEC

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[13] As the Court of Appeals points out, it is not a simple matter to divine the FEC's position. The Commissioners make no formal decisions of their own, nor do they "endorse" or "ratify" the General Counsel's report before them when they make a decision. *See* App. *DSCC v. FEC*, at p. A9, n. 23.

[14] *See* App., *DSCC v. FEC*, at p. A14.

[15] *See* Pet. FEC Br., at pp. 11-13.

[16] The FEC carried an especially demanding burden since the result it seeks to reach, namely, the authorization of "agency" agreements under §441a(d), appears on its face to conflict with the plain letter requirements of the provision. It is in this light, as well, that the prevarications and shifts of the FEC on this issue constitute "arbitrary and capricious" conduct.

has acted arbitrarily, capriciously, or contrary to law"). In all such cases, courts look behind the cloak of "deference" and seek to determine whether the statute can reasonably support the agency's construction. *See*, e.g. *Gelman v. Federal Election Commission*, [1980] Fed. Elec. Camp. Fin. Guide (CCH) ¶9130 (D.C. Cir. July 18, 1980), *cert. denied*, 49 U.S.L.W. 3227 (U.S. Oct. 6, 1980) (No. 80-209) where the court found deference justified when the "agency's interpretation is supported by the language and overall purpose of the statute" and when "petitioner's construction leads to a conclusion illogical or at odds with the apparent purpose of the statute."

Thus, the Court of Appeals correctly found that the agency's construction of §441a(d), which was plainly "contrary to law", did not warrant deference.

## III. The Court Of Appeals Correctly Concluded That The National Republican Senatorial Committee's Assumption Of State Committee Limits Violated §441a(d) Of The Act.

### A. NRSC's assumption of State committee limits cannot be reconciled with the plain language of §441a(d).

As the Court of Appeals correctly concluded, the unambiguous language of §441a(d) does not permit the construction advanced by NRSC and FEC. The provision confers special spending authority in Congressional elections on only two specifically named, specifically defined party entities: "the national committee" of a political party, and any "State committee", including any of its subordinate committees. The NRSC concededly is neither "the national committee" nor a "State committee".[17] Yet by its construction, and that of the FEC,

[17] 2 U.S.C. §431(14) defines "the national committee" as "the organization which, by virtue of the by-laws of a political party, is responsible for the day-to-day operation of such political party at the na-

it may substitute itself for both such committees and utilize their assigned limits, with its own funds, in spending on behalf of federal candidates.[18] As "plain meaning" continues to be the touchstone in matters of statutory construction, *Securities Exchange Commission v. Sloan*, supra; *Camanetti v. United States*, 242 U.S. 470 (1917); *March v. United States*, 506 F.2d 1306 (1974), the construction of NRSC and FEC here cannot stand.

Indeed neither FEC nor NRSC give any weight to "plain meaning" in their attempt to uphold these "agency agreements". Instead they argue circuitously that since the NRSC may arguably transfer unlimited sums to the State committees, *see* 2 U.S.C. §441a(a)(4), thereby achieving the same results as agency agreements by different means, the statute must logically permit the more direct "agency" approach. It is, however, an established principle, that "[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929); *accord, National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974). Congress expressly defined a vehicle for party committee spending in §441a(d), and as its intention could not be clearer, that intention must be honored.

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tional level, as determined by the Commission." The Republican National Committee is the "national committee" of the Republican Party. 2 U.S.C. §431(15) defines "State committee" as the "organization which, by virtue of the by-laws of a political party, is responsible for the day-to-day operation of such political party at the State level, as determined by the Commission."

[18] As the Court of Appeals noted, the "agency" terminology applied to this wholesale assumption by NRSC of State committee limits is "somewhat misleading". *See* App., *DSCC v. FEC*, at p. A14. NRSC does not function at all as an "agent" in the classic sense, but rather as a principal entitled to utilize the full State committee limit with its own funds.

**B. The construction urged by petitioners would vitiate the State and local party-building purposes behind § 441a(d).**

The constructions urged by Petitioners NRSC and FEC would undercut Congress' attempt in § 441a(d) to provide a vehicle for State and local party development in the political process. Instead of stimulating State committee involvement in federal campaigns, the 2 cent limit assigned to those committees would be a mere supplement to the NRSC's own spending authority. The Court of Appeals correctly concluded that State committees were not intended to serve as "legal shells" in this fashion.[19]

Petitioner NRSC concedes that Congress intended § 441a(d) as a means to ". . . preserve the place of political parties in the elective process."[20] Of course, the political party structure in this country has always functioned on different levels, namely, local, state and national levels, and the legislative history of § 441a(d) makes clear that Congress was concerned as much with State and local party development, as with promotion of the national party structure. *See* remarks of Senator Cannon, Chairman of the Senate Rules Committee and Member of the Conference, 120 Cong. Rec. 518, 525 (1974).[21] Not only did Congress emphasize the State and local party building function, but the Court of Appeals found no indication that Congress anticipated, "much less intended", that

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[19] *See* App., *DSCC v. FEC*, at p. A14.

[20] *See* Pet. NRSC Br., at p. 12 (*citing* S. Rep. No. 93-689, 93rd Congress, 2nd Session, *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 103 (1977)).

[21] *See also* remarks of Representative Frenzel, a member of the Conference Committee, who explained on the floor 441a(d)'s purpose in increasing "the role of political parties in campaign financing", and who emphasized the parallel federal and state focus of the provision in granting enhanced spending power to "[B]oth the national committee and the State committee of a political party". 120 Cong. Rec. H10, 332 (daily ed. October 10, 1974).

NRSC as a Congressional campaign committee would supplement its own authority with State committees' 2 cent limit.[22]

The State and local party building concern of §441a(d) does not stand alone, but is manifest throughout the Act. Thus, in §441a(a)(4), State committees are granted a special exemption from one of the conditions precedent to "multicandidate" status, an exemption designed to allow such committees to qualify more readily for a higher $5,000 per candidate per election limit.[23] In addition, State party committees, and only State party committees, are exempted altogether from limits in spending for voter registration and "get-out-the-vote" drives on behalf of Presidential and Vice Presidential candidates, and in spending for campaign materials, such as buttons and bumper stickers, for use in "volunteer" activities on behalf of federal candidates.[24] These last two exemptions, in particular, are expressly and strictly contingent on the State committees funding these activities themselves, without receiving funds for this purpose from any national party committees.[25] Section 441a(d) is therefore fully consistent with these State and local party building provisions.

This view of "overall purpose" of the statute is critical to a fair construction of §441a(d), *Gelman v. Federal Election Commission, supra*, for each provision of the Act must be construed to give the statute as a whole "'the most harmonious, comprehensive meaning possible' in light of the legislative

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[22]Congress provided specifically for spending by Congressional campaign committees, including NRSC, in §441a(h) of the Act, and indeed rejected a proposal to exempt them from limits altogether. As the Court of Appeals has stated, nowhere did Congress manifest in its deliberations the intention or awareness that the Congressional committees would circumvent their limits through "agency" agreements under §441a(d). *See* App., *DSCC v. FEC*, pp. A14-16.

[23]*See* 2 U.S.C. §441a(a)(4). This provision defines the conditions which political committees must satisfy to qualify for the higher "multicandidate" $5,000 per candidate per election limit. One such condition, that of making contributions to five or more federal candidates, applies to all committees "except for any State political party organization".

[24]*See* 2 U.S.C. §§431(8)(B)(x), (xii) and 431(9)(B)(viii), (ix).

[25]*See* 11 C.F.R. §§100.7(b)(15)(vii); 100.7(b)(17)(vii). In discussing the exemption from limits for "volunteer" activities, the House Report stresses its "purpose . . . to encourage volunteers to work for and

policy and purpose." *Weinberger v. Hynsen, Westcott and Dunning, Inc.*, 412 U.S. 609, 632 (1973), citing *Clark v. Uebersee Finanz-Korp.*, 332 U.S. at 488. The Court of Appeals correctly viewed §441a(d) in its statutory context in construing that provision to preclude NRSC's "agency" agreements with State committees.

## IV. The Court Of Appeals Decision Neither Implicates Nor Impermissibly Infringes NRSC's First Amendment Rights Of Expression Or Association.

### A. No First Amendment issues are presented by interpreting §441a(d) to preclude "agency agreements" with State party committees.

As the Court of Appeals correctly noted, Petitioner NRSC made no "frontal attack" on the constitutionality of §441a(d) limits, and those limits are not in question here.[26] NRSC seeks instead to avail itself fully of §441a(d) spending limits, but only on its own terms, namely, through the device of an "agency agreement" with State committees whereby it assumes those committees' expenditure limits, in their entirety, for its own purposes.

The First Amendment does not confer upon NRSC the right to alter the statute, to its benefit, in this fashion, especially where the alteration sought would be inconsistent with a fundamental Congressional purpose of promoting State and local party activity. *See Republican National Committee v. Federal Election Commission*, (*"RNC v. FEC"*) [1980], Fed. Elec. Camp. Fin. Guide (CCH) ¶9112 (S.D.N.Y. Feb. 5, 1980) *aff'd* 48 U.S.L.W. 3662 (April 14, 1980). Thus, notwithstanding the NRSC's attempt to clothe the issue here in constitutional terms, the issue remains as framed by the Court of Appeals: "... may party organizations effectively rewrite §441a(d)(3) of the Act to displace State committees and substitute Congressional campaign committees in their stead?"[27]

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with local and State political party organizations". H. Rept. No. 96-422, 96th Congress 1st Session, *reprinted in* [1979] U.S. Code Cong. and Admin. News 2860, 2868.

[26] *See* App., *DSCC v. FEC*, at p. A13, n. 28.

[27] *See* App., at p. A18, n. 37.

Moreover, as construed by the Court of Appeals, §441a(d) in no way bars NRSC from meaningful association with State committees in the expenditure of funds under that provision. NRSC may transfer funds to State committees for expenditures by these committees pursuant to §441a(d). 2 U.S.C. §441a(a)(4). NRSC may also hire staff to work with State committees in effecting spending under that provision. What it may not do is vitiate the purpose of the provision altogether by assuming the limits of the State committees, and thereby rendering their intended spending role a nullity. Viewed in its simplest terms, NRSC is claiming here that it is entitled, as a matter of constitutional law, to what is, in its view, the most effective or convenient possible vehicle for the exercise of its associational rights. Yet it is settled that "[N]ot every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid." *RNC v. FEC, supra, citing Corbitt v. New Jersey*, 439 U.S. 212, 218 (1978).

In any event, the constitutional burdens alleged by NRSC are not the work of §441a(d) itself, but rather the consequence of an entirely avoidable decision by Republican committees to concentrate all spending powers in NRSC under this "agency" arrangement. NRSC has other alternatives available in associating with State committees under §441a(d), but it has chosen not to exercise them. "Instead of persuading us that this is a case in which a . . . statute has imposed substantial burdens on the Party's right to govern its affairs, appellants' own statement of the facts establishes that it is the Party's exercise of that very right that is the source of whatever burdens they suffer." *Marchioro v. Chaney*, 442 U.S. 191 (1979).

**B. If the prohibition on "agency" arrangements does infringe on NRSC's associational rights, these infringements are marginal and are outweighed by significant governmental interests.**

In construing §441a(d) to prohibit these "agency" arrangements, the Court of Appeals reasoned that to allow them

would undercut the role of State party committees under the provision and would thereby frustrate the Congressional purpose of promoting "vigorous state party organizations".[28] Contrary to NRSC's representations, this Congressional concern with vital State and local participation in the federal elective process is a significant interest which outweighs any marginal intrusions on NRSC's associational rights.

In the exercise of its constitutional authority to regulate the conduct of federal elections, *Buckley v. Valeo*, 424 U.S. 1, 14 (1974), the Congress has erected in the FECA a complex scheme of financing limit and disclosure requirements. Throughout this legislation, Congress has manifested a strong concern that adequate provision be made in this scheme for the expression of State and local interests and for the continued development of State and local participation. There is nothing novel about this concern; it represents a traditional and continuing State commitment to the principles of "Our Federalism". More specifically, it is directed toward a goal, long recognized as legitimate, of ensuring fair and representative elections. Thus in *Marchiorio v. Chaney, supra*, this Court characterized as a legitimate State interest the regulation of State party committees to ensure their representative character: "The States interest in ensuring that this [elective] process is conducted in a fair and orderly fashion is unquestionably legitimate . . . . [T]hat interest is served by a . . . statute requiring that a representative central committee be established . . . ."[29] *Id.*, p. 2246-7.

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[28] *See* App., *DSCC v. FEC*, at p. A5.

[29] Petitioner NRSC mistakenly suggests that only the interest in avoiding corruption is sufficient to justify marginal infringements on associational rights. *Buckley* does not stand for this proposition; it merely found it unnecessary to look beyond that interest in sustaining the limits on contributions that Congress sought to impose. 424 U.S., at 27 (1974). In other contexts, which NRSC fails to mention, the Court has found other interests sufficient to sustain direct and significant infringements on political activity. *See United Public Workers v. Mitchell*, 330 U.S. 75 (1947) (upholding Hatch Act prohibition on partisan political activity by federal civil service employees).

Measured against the significance of the government interest at issue here, the infringements of NRSC's associational rights must be deemed marginal. This is especially the case in view of the many alternatives available to NRSC in effecting its rights of association with State committees in spending § 441a(d) funds. NRSC may transfer funds, in unlimited amounts, to State committees for expenditure under that provision, or may hire or otherwise delegate staff to work with and advise NRSC in spending § 441a(d) funds as efficiently or wisely as possible. In upholding various provisions of the FECA in the face of similar First Amendment challenges, the courts have consistently pointed to the availability of alternative means of effecting speech and associational rights. *Bread Political Action Committee v. Federal Election Commission*, [1980] Fed. Elec. Camp. Fin. Guide (CCH) ¶9142 (7th Cir., Dec. 5, 1980); *California Medical Association v. Federal Election Commission*, [1980] Fed. Elec. Camp. Fin. Guide (CCH) ¶9127 (9th Cir., May 23, 1980); *RNC v. FEC, supra.*

Thus, the applicable precedents do not support, and this Court need not review, the NRSC's assertion that its First Amendment rights were impermissibly violated by the Court of Appeals' vindication of the plain language of § 441a(d).

## CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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## APPENDIX A

**Opinion of the United States Court of Appeals for the District of Columbia Circuit**

(Decided October 9, 1980)

No. 80-2074

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
*Appellant,*

v.

FEDERAL ELECTION COMMISSION,
NATIONAL REPUBLICAN SENATORIAL COMMITTEE,
*Intervenor.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(D.C. Civil Action No. 80-01903)

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Before WRIGHT, *Chief Judge*, and WILKEY and GINSBURG, *Circuit Judges.*

Opinion for the court *per curiam.*

Dissenting opinion filed by *Circuit Judge* WILKEY.

PER CURIAM: This case calls for construction of the Federal Election Campaign Act of 1971 (FECA) and its 1974

and 1976 Amendments, 2 U.S.C. § 431 *et seq.*[1] Under a provision of the Act that permits the State committees of the political parties to make expenditures on behalf of senatorial candidates,[2] a number of Republican State committees have executed agreements by which they purport to designate the National Republican Senatorial Committee (NRSC) as their agent for purposes of making expenditures up to the legal limits. The Democratic Senatorial Campaign Committee (DSCC) has challenged this practice as contrary to the letter and purpose of the applicable statutory provisions. The DSCC first sought relief by filing a complaint with the Federal Election Commission (FEC), which upheld the legality of the "agency" agreements.[3] Assuming that it must sustain Commission decisions not shown to be arbitrary and capricious, the District Court granted the FEC's motion for summary judgment.[4] Because we believe that both the FEC and the District Court misconstrued the applicable law, we reverse.

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[1] The Federal Election Campaign Act (FECA) of 1971, Pub. L. No. 92-225, 86 STAT. 3, was amended by the FECA Amendments of 1974, Pub. L. No. 93-443, 88 STAT. 1263, by the FECA Amendments of 1976, Pub. L. No. 95-216, 91 STAT. 1655, and by the FECA Amendments of 1979, Pub. L. No. 96-187, 93 STAT. 1339. The relevant provisions of the Act are hereinafter cited to the United States Code only; section references are all to Title 2.

[2] 2 U.S.C. § 441a(d)(3). The section also authorizes expenditures on behalf of House candidates.

[3] The Commission decision in this case, which it designated as Matter Under Review (MUR) 1234, issued on July 10, 1980.

[4] The decision of the District Court, rendered August 28, 1980, is printed in the Joint Appendix (JA) at 157.

## I. FACTUAL AND PROCEDURAL BACKGROUND

### A. *Agency Agreements*

The Federal Election Campaign Act, as amended, imposes limitations on campaign contributions and expenditures by individuals and by various kinds of political committees. Section 441a(d)(3), the provision centrally at issue in this case, provides for campaign spending by State and national committees of the political parties:

> (3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate * * * which exceeds—
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> * * * * *
>
> (i) 2 cents multiplied by the voting age population of the State * * *.

Although phrased in restrictive terms, Section 441a(d)(3) is in fact a grant of permission: It permits the national and State committees to make expenditures that would otherwise be prohibited.[5]

As it has done in each campaign since 1976, the Republican National Committee has designated the NRSC as its agent, authorized to make the expenditures permitted to the national committee by Section 441a(d) in all senatorial elections.

Various State committees of the Republican Party have also designated the NRSC as their agent under Section 441a(d). As in the case of the national committee, their agency agreements purport to transfer to the NRSC spending authority

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[5] *See* brief for appellee at 10 n.5 ("Absent § 441a(d), party committees could make no expenditures whatsoever in connection with the Congressional campaigns of their party's candidates.").

conferred under Section 441a(d)(3).[6] In the 1978 senatorial elections, during which the State committees commissioned the NRSC as their agent for the first time, the NRSC spent a total of $2,770,995 under the combined spending authority of the national and State party committees.[7] Most of the money went into 12 closely contested races, in which the NRSC spent $2,180,499. Of this sum, $1,106,286.60 was attributable to its expenditures as agent for the national committee, the remaining $1,074,213.40 to expenditures as agent of various State committees.

Agency agreements related to 1980 contests purport to authorize the NRSC to spend even larger sums. There are Senate races in 34 States, whose 34 Republican State committees have a composite spending ceiling of $3,487,020.80 under Section 441a(d)(3).[8] A number of these State committees have designated the NRSC as their authorized spending agent. In California alone, the NRSC will be able to spend up to $485,-024 as the agent of the State committee, and a total of $970,-048 in its capacity as dual agent of the State and national committees. In New York the comparable figures are $379,717.12 and $759,434.24.

B. *Proceedings Before the Federal Election Commission*

On May 9 of this year the Democratic Senatorial Campaign Committee filed a complaint with the Federal Election Commission in which it challenged the legality of the agency

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[6] A sample "agency" agreement, pursuant to which the Alabama Republican Executive Committee designated the National Republican Senatorial Committee (NRSC) as its agent for making the senatorial campaign expenditures authorized by § 441a(d)(3), appears as Appendix B to the brief for intervenor NRSC.

[7] JA 105.

[8] JA 106.

agreements entered by the NRSC and the various Republican State committees.[9] In its accompanying memorandum of law,[10] the DSCC argued that the challenged arrangements violate the plain meaning of Section 441a(d)(3), which provides separate spending limits for State and national party committees and makes no reference to agency. The DSCC claimed that a clear purpose of the statutory scheme was to create an incentive to the development of vigorous State party organizations. The DSCC did not challenge the agency agreement between the NRSC and the Republican National Committee, since the FEC at that time interpreted a Commission regulation, 11 C.F.R. § 110.7, to authorize such agreements.[11] Moreover, the DSCC itself has made an agency agreement with the Democratic National Committee.

The Commission dismissed the complaint. Although it gave no reasoned explanation of its decision, the FEC acted after receipt of a report from its General Counsel.[12] The "First General Counsel's Report" stated that this was the third time that a complaint of this kind had come before the Commission. Although it recommended the same result that the FEC had reached in the prior cases, [13] the report suggested that the

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[9] The complaint is reprinted at JA 1-9.

[10] Reprinted at JA 19-28.

[11] In fact, the regulation authorizes agency agreements only in presidential campaigns. The FEC has since conceded its interpretive error. *See infra.*

[12] First General Counsel's Report, July 8, 1980, reprinted at JA 46-57.

[13] The FEC had decided the prior cases, designated MUR 780 and MUR 820, in response to complaints about NRSC spending pursuant to "agency" agreements during the 1978 campaigns. The decision in MUR 780 came in response to a complaint by the National Committee for an Effective Congress concerning expenditures during the Montana senatorial campaign of Larry Williams; the FEC apparently acted *sua sponte* in initiating the MUR 820 inquiry into the financing of the senatorial campaign of James Martin of Alabama. The Commission did not come to a decision on either MUR 780 or MUR 820 until after the election. *See also infra.*

General Counsel's emphasis shifted over the course of the various proceedings.[14] In the first proceeding the General Counsel had attributed importance to the absence of any express statutory prohibition of agency arrangements. In this case, however, the General Counsel placed greater reliance on an inference of congressional intent apparently drawn from a related section of the Federal Election Campaign Act, Section 441a(a)(4). That provision allows for unlimited transfers of money between and among political committees of the same party, as defined by the statute.[15] Assuming that the NRSC was a committee of the Republican Party within the meaning of Section 441a(a)(4), the General Counsel reasoned that, because the NRSC could lawfully transfer money to the State committees, which the State committees could then spend up to a limit of 2 cents per resident of voting age, the statute must have intended that the NRSC could itself make expenditures up to that limit while acting as the agent of the State committees.[16] The General Counsel also cited the more general argument that the provision permitting expenditures by the State and national party committees was intended to be "broad"—broad enough to permit the pooling of large numbers of small contributions made to the political parties and their various committees. After receiving the General Counsel's report on July 8, the Commission rendered its judgment on July 10.[17] By a vote of 6-0 it found "no reason to believe" that the NRSC's agency agreements with the State committees violated

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[14] First General Counsel's Report, *supra* note 12, at 4-5, JA 49-50.

[15] Section 441a(a)(4) provides in pertinent part:

> The limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party. * * *

[16] *See* First General Counsel's Report, *supra* note 12, at 5, JA 50 (quoting MUR 820) and 8, JA 53.

[17] JA 58.

Section 441a(d)(3). The FEC's summary announcement of the decision did not explicitly adopt the report of the General Counsel.[18]

C. *Proceedings Before the District Court*

The DSCC sought District Court review of the FEC's action.[19] Its petition, filed July 30, 1980, requested a declaratory judgment that the FEC's decision was "contrary to law," on the theory that Section 441a(d)(3) precludes the State committees from assigning their spending limits to the NRSC. Ruling on cross-motions for summary judgment, the District Court decided in favor of the FEC on August 28. The court held that the FEC must prevail unless its action was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law."[20] Judge June Green found no violation of that standard. The District Court construed the decision of the FEC as resting on the inference, advanced by the General Counsel, that the transfer of funds provision of Section 441a-(a)(4), when read in conjunction with Section 441a(d)(3), revealed a congressional willingness to treat the funds and expenditures of various party committees, including the NRSC, as essentially interchangeable.[21] The DSCC docketed an appeal in this court on September 4, 1980. The NRSC moved to intervene on September 19, and the court agreed to the intervention.

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[18] *See id.* The failure to incorporate the First General Counsel's Report was in accord with usual FEC procedures. *See infra.*

[19] Jurisdiction for review in the District Court is provided by 2 U.S.C. § 437g(a)(8). The District Court summarily denied a motion to intervene filed by the NRSC.

[20] *Democratic Senatorial Campaign Committee v. FEC*, D. D.C. Civil Action No. 80-1903, Aug. 28, 1980, memorandum opinion at 3, JA 159.

[21] *Id.*

## II. STANDARD OF REVIEW

The District Court regarded the decision of the FEC as entitled to extreme deference. We approach the matter differently.

Although a court should undertake only "a very limited review of the exercise of the FEC's discretionary decisions," *In re Carter-Mondale Reelection Committee, Inc.*, ____ F.2d ____, ____ (D.C. Cir. No. 80-1841, decided September 12, 1980) (slip opinion at 15), we deal in this case, not with a discretionary exercise of Commission power, but with an interpretation of a federal statute. The Supreme Court has long recognized that "the courts are the final authorities on issues of statutory construction" and need not "rubber-stamp" administrative decisions that misinterpret a federal statute. *SEC v. Sloan*, 436 U.S. 103, 118 (1978) (*quoting Volkswagenwerk v. FMC*, 390 U.S. 261, 272 (1968), and *NLRB v. Brown*, 380 U.S. 278, 291 (1965)).

We recognize that special deference to an agency's interpretation of its governing statute is often appropriate. *Cf. Gelman v. FEC*, ____ F.2d ____, ____ (D.C. Cir. No. 80-1646, decided July 18, 1980) (slip opinion at 9). But the Supreme Court has established that an agency's entitlement to deference depends upon the quality of its determinations.[23] Factors to be considered include " 'the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements.' " *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287 n.5 (1978) (*quoting Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). Measured against this standard, the Commission's performance in the matter before us fails to merit the court's substantial deference.

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[23] *Compare Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434 (1971), *with Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 92-96 (1973), *and General Electric Co. v. Gilbert*, 429 U.S. 125, 140-143 (1976).

First, the Commission has presented no reasoned explanation of its decision. It merely pronounced that it found "no reason to believe" that the NRSC violated the Act in making expenditures as agent of the national and State committees.[23] We are not even certain whether the Commission endorsed the reasoning of its General Counsel, since the Commission's decision did not explicitly adopt the General Counsel's report and the Commission's own newsletter, the *FEC Record*, has avowed that Commission actions "are not necessarily based on, or in agreement with, the General Counsel's analysis."[24]

Second, even if we were to accept the analysis of the General Counsel as that of the Commission, we would still encounter a troubling absence of consistent reasoning. On two prior occasions, the first January 19, 1979 and the second June 17, 1979, the FEC upheld the legality of NRSC-State committee agency agreements. In those cases, as in the case at bar, the FEC file apparently included a General Counsel's report recommending approval of the challenged agreements.[25] From report to report, Counsel's grounds for his recommendation shifted perceptibly.

In the first case, the General Counsel rested on the absence from the text of Section 441a(d)(3) of an explicit prohibition of agency agreements and on a reading of Section 441a-(a)(4) that would permit unlimited transfers of funds from NRSC to the State committees. *See* First General Counsel's Report, *supra*, at 4, JA 49.

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[23] This bare pronouncement reflects consistent Commission practice. After concluding a case the FEC places the relevant documents, including staff reports and recommendations, in a public file. The Commission does not endorse the reasoning of its staff, nor does it offer reasons of its own. *See* Note, *The Federal Election Commission: The First Amendment and Due Process*, 89 YALE L. J. 1199, 1211-1212 (1980).

Failure to adhere to accepted standards of reasoned decisionmaking not only undermines public confidence but may actually impair the substantive quality of the Commission's performance. *See id.* at 1211. It also deprives a reviewing court of any Commission record on which to base a deferential consideration.

[24] *FEC Record*, Oct. 1979, at 4.

[25] The FEC has not supplied copies of those reports. The First General Counsel's Report in the present case, however, refers back to the earlier reports.

In the second proceeding he added a new justification, arguing that a recently promulgated regulation, 11 C.F.R. § 110.7, permitted the national committee of a political party to designate any agent for the purpose of making Section 441a(d)-(3) expenditures. Because the goal of that regulation was to promote coordination among party committees, the Counsel reasoned that the State committees should also be permitted to designate spending agents under Section 441a(d)(3). *See* First General Counsel's Report, *supra*, at 5, JA 50.

The present litigation has evidenced three more changes in the position of either the General Counsel or the Commission. First, and most important, the Commission brief in this court disavowed the heavy reliance that the General Counsel once placed on a provision of 11 C.F.R. § 110.7. *See* brief for appellee at 9-12. Because the section relied upon, Section 110.7(a)(4), authorizes agents only in connection with presidential campaigns, not congressional contests, the FEC has now conceded that prior citations to the section to sustain the designation of agents in Senate races seriously misconstrued the regulation. Nonetheless, the misconstruction appeared in the First General Counsel's Report made public at the time of the Commission's decision in this case.

In a second significant change, the General Counsel retreated from any substantial reliance on the absence of an express agency prohibition in the text of Section 441a(d)(3). First General Counsel's Report, *supra*, at 4, JA 49. Third, and finally, the General Counsel's report presented a new argument to justify the legality of agency agreements. Once again relying primarily on Section 441a(a)(4), the Counsel appended the corollary claim that congressional failure to amend that section to prohibit transfers of funds by the NRSC constitutes implicit ratification of the Commission's position. *Id.* at 8-11, JA 53-56.

These alterations in grounds for the agency's decision do not warrant our rejection of any individual argument proffered by the General Counsel or the Commission. We are prepared to consider each, in its turn. But the Counsel's shifting positions offer no adequate support for a claim that the Commission's position here is a product of thorough consideration, careful

deliberation, and secure judgment. We must decide for ourselves whether the action of the Commission was "contrary to law."[26]

## III. EXPENDITURE LIMITATIONS UNDER SECTION 441a(d)(3)

The agency agreements executed by the Republican State committees and the NRSC purport to transfer spending authority conferred by Section 441a(d)(3). Our inquiry into the permissibility of such agreements begins with examination of the statute itself.[27] Accepted principles of construction establish

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[26] The dissent makes two distinct points concerning the respect the Commission's decision should command. First, the Commission is entitled to deference in construing its own statute. *See* dissenting op. at 1. Second, the court should refrain from upsetting an arrangement supported by "precedent established over the lifetime of the practice." *Id.* at 10. The dissent does not weight, indeed it does not mention, the failure of the FEC to provide a consistent, reasoned explanation of the position it has taken. Moreover, the dissent's reliance on "established" precedent hangs by a slender thread. Commission decisions relevant to this case are of recent vintage. Judge Wilkey recites Commission precedent in four numbered paragraphs. *See* dissenting op. at 10-11. Only one of the recitations is squarely in point. The first three paragraphs relate to Commission expressions on delegations by the *national* rather than the State committees. The fourth paragraph invokes the FEC decisions in MURs 780 and 820, the only precedents directly on target. But neither of these matters was decided until 1979. Prior to the District Court opinion in this case, *no* judicial precedent existed. When Congress expressly provides litigants with a right of judicial review, it is not open to the court to shirk its responsibility by invoking an intervenor's reliance on a short course of unreviewed agency actions.

[27] Intervenor NRSC appears to believe that we are not entitled to reach this question, being bound instead to hold for the FEC under principles of *res judicata* and collateral estoppel which NRSC contends forbid our hearing the case. *See* brief for intervenor at 10. We are of the view that claim and issue preclusion principles are inapplicable to the present case. Where, as here, the statute provides for judicial review, an agency's decision on a question of law does not control the judgment of an Article III court. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 131, comments a and d, at 32-33, 39 (Tent. Draft No. 7 1980) ("[An] agency determination is no more res judicata in [a judicial] review proceeding than is a trial court judgment res judicata in an appellate court in which it is under appeal.").

the presumption that the terms of statutes are ordinarily intended to carry their plain meaning. *See SEC v. Sloan, supra; Caminetti v. United States*, 242 U.S. 470 (1917); *March v. United States*, 506 F.2d 1306 (D.C. Cir. 1974).

The relevant language of Section 441a(d)(3) authorizes "the national committee of a political party, or a State committee of a political party, including any subordinate State committee," to make "any expenditure" of up to 2 cents per voting-age resident on behalf of the party's senatorial candidate. The operative terms are plain and precise. There is no suggestion that Congress chose its language loosely. Section 441a(d)(3) not only designates spending limits with mathematical rigor; it also confers authority to reach those limits on two named committees, both clearly identified by statutory definitions. Section 431(14) defines the "national committee" as "the organization which, by virtue of the by-laws of a political party, is responsible for the day-to-day operation of such political party at the national level." Section 431(15) defines a "State committee" as "the organization which, by virtue of the by-laws of a political party, is responsible for the day-to-day operation of such political party at the State level."

It is obvious that the NRSC is neither the "national" nor a "State" committee of the Republican Party within the contemplation of Section 441a(d)(3). Nor do we understand either the FEC or the NRSC to contend that the NRSC qualifies as a "subordinate committee of a State committee," the third kind of committee to which Section 441a(d)(3) refers. Nor, finally does the statute make reference to any other kind of permissible arrangement by which the State party organizations might convey their spending authority to any other organization. The plain language of the statute thus seems to preclude any arrangement by which the special authority of a named entity is transferred to another.[28]

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[28] The dissent, like intervenor NRSC but unlike the FEC, argues that First Amendment rights of speech and association would be violated if § 441a(d)(3) were construed to deny the capacity of State committees

(Continued on following page)

In its brief as an intervenor in this court, NRSC urges the contrary inference. In so doing, it rehearses an argument invoked by the Commission's General Counsel in an earlier case, the same one on which the General Counsel no longer places substantial reliance. *See* First General Counsel's Report, *supra*, at 4, JA 49. According to the NRSC, this court should infer that agency agreements are permissible under Section 441a(d)-(3) because the statutory text includes no express prohibition of agency relationships. The NRSC's argument depends for its plausibility on its use of "agency" terminology. The language of Section 441a(d)(3) presumably does not prohibit a State political committee's employment of an agent in the standard legal sense; the failure of the statute to mention agency does not, for example, mean that the State committees may not hire staff authorized to act in their behalf. Against this background of familiar usage, however, it is somewhat misleading to characterize the challenged relationships between the State committees and the NRSC as ones of "agency." The State

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Footnote continued—

to assign their statutory authority to the NRSC. Reliance for this argument is placed on *Buckley v. Valeo*, 424 U.S. 1 (1976). That decision held unconstitutional limitations on independent expenditures by individuals and non-party associations in election campaigns. The Court addressed and upheld expense ceilings on national and State party committees only in the context of the Fifth Amendment challenge there made. 424 U.S. at 58-59 nn. 66, 67. But as the FEC notes, brief for appellee at 10 n. 5, independent expenditures are not at issue here: "Party committees * * * are deemed incapable of making independent expenditures in connection with the campaigns of their party's candidates." *Cf.* 2 U.S.C. § 441(a)(7)(B)(i) (and expenditure made "in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate.").

Nor do we understand NRSC to suggest in this case that it has made independent expenditures on behalf of candidates, expenditures of the kind the *Buckley* Court found to be constitutionally protected. And surely no frontal attack has been made by NRSC on the constitutionality *vel non* of expenditure limitations imposed on party organs.

committees do not, in the role of principal, raise and transfer funds to the NRSC as agent; nor do they give any direction as to how "their" funds ought to be spent. Rather, the NRSC raises and spends money as it sees fit; the State committees interact with the NRSC only in the initial agreement to the arrangement. Thereafter the State committees serve as legal shells. We cannot believe that Congress intended the language of Section 441a(d)(3) to authorize artificial relationships of this kind.

We are buttressed in our reliance on the clear language of Section 441a(d)(3) both by the provision's statutory context and by legislative history. The NRSC and its parallel congressional campaign committees were familiar to the Congress that adopted Section 441a(d)(3). Indeed, Congress specifically provided for such committees in Section 441a(h), which permits "the Republican or Democratic Senatorial Campaign Committee, or the national committee of a political party, or any combination of such committees" to make direct contributions of up to $17,500 to senatorial candidates, "notwithstanding any other provision of this Act."[29] If Congress had similarly intended for the NRSC to share in the spending permissions of Section 441a(d)(3), it is not unreasonable to think that Congress would have said so explicitly, or at least signalled its intention in the course of its deliberations.

Yet the legislative history gives no hint that Congress ever foresaw, much less intended, that delegations of spending authority under Section 441a(d)(3) might be attempted. On

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[29] Appellant Democratic Senatorial Campaign Committee argues that the language of § 441a(h) by its own force prohibits any "agency" agreements that lead to NRSC expenditures of more than $17,500 in any single Senate race. *See* brief for appellant at 18-20. In its view, § 441a(h) exhibits clear congressional intent to limit NRSC expenditures to this amount. Because we rest our holding on the plain language of § 441a(d)(3) itself, we need not decide whether § 441a(h) implies a limitation on § 441a(d)(3) or any other provision of the Act.

the contrary, during the 1974 legislative debates Senator Brock noted with concern that the Act and its proposed Amendments failed to provide more permissive treatment to the congressional campaign committees.[30] Though he was fully aware of the proposed Section 441a(d)(3) permission for expenditures by the national and State committees—and in fact mentioned it during his remarks—Senator Brock proposed a further amendment that would have exempted congressional campaign committees like the NRSC from the Act's expenditure limits. "I offer this amendment," he said, "because I do not believe that as the bill is written [the congressional campaign committees] could literally operate in support of our candidates under the existing language."[31]

The Senate initially adopted the amendment offered by Senator Brock, but reversed itself five days later.[32] The record of the Senate debate leading to repeal of the Brock amendment is equally revealing. With the attention of the Senate again riveted on the status of the congressional campaign committees under the Federal Election Campaign Act, not a single Senator ever suggested that the NRSC or any similar committee might be able to assume the spending authority of the State committees. Moreover, the 1974 debates evidence a congressional distinction between the political parties, whose role in the political process Congress sought to strengthen, and the campaign committees of the House and Senate. Senator Clark, who led the fight to repeal the Brock amendment, spoke to this point explicitly. "No one," he said, "should confuse national political parties, supported as they are by thousands of people giving in $5 and $10 amounts, with the Senate and House Campaign Committees."[33]

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[30] 120 Cong. Rec. S5189-S5191 (daily ed. Apr. 3, 1974).

[31] *Id.* at S5189.

[32] *Id.* at S5411-S5415 (daily ed. Apr. 8, 1974).

[33] *Id.* at S5411.

Thus, no more in the legislative history than in the language of Section 441a(d)(3) do we find support for the kind of transfer of statutory authority at issue in this case.[34]

## IV. RELEVANCE OF THE TRANSFER PROVISION

The FEC argues that since Section 441a(a)(4) permits the NRSC to transfer unlimited funds to the State committees, it would be "placing form over substance" to forbid the State committees to designate NRSC as their agent. Brief for appellee at 17. We do not address the question whether NRSC may freely transfer funds to State committees under Section 441a-(a)(4), because that issue was not joined before this court. While not conceding the validity of such transfers,[35] DSCC does not now challenge transfers of funds from NRSC to the State committees, apparently because no such transfers have ever been made.

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[34] Appellee purports to find evidence of congressional support for its construction of § 441a(d)(3) in the failure of Congress to enact legislation that would have prohibited explicitly any "movement of funds" between State political committees and congressional campaign committees such as the NRSC. *See* brief for appellee at 14-15. The evidence is entirely unpersuasive. First, post-enactment legislative history has very limited utility in statutory construction, *see SEC v. Sloan*, 436 U.S. 103, 120-122 (1978), and in no case could it change the intent of the Congress that passed the statute. *See Regional Rail Reorganization Cases*, 419 U.S. 102, 152 (1974). Second, the House never actually rejected the bill on which appellee relies, but instead refused to consider the measure on its merits. *See* 124 Cong. Rec. H2261-H2269 (daily ed. Mar. 21, 1978). Third, even within the bill the transfer provision was relatively minor; it is at best unclear that the vote to deny legislative consideration on the merits was motivated by opposition to any particular section. Fourth, the House debate and vote occurred before any FEC decision upholding the legality of agency agreements between State committees and the NRSC under § 441a(d)(3). Fifth, and most important, the proposed ban on the transfer of funds, even had it been adopted, would not speak directly to the issue in this case. Our question involves the legality of an arrangement by which a State committee purports to assign its statutory spending rights to the NRSC, not the legality of a fund transfer.

[35] We have some doubt about whether § 441a(a)(4) encompasses the congressional committees at all. In order to fall within that section the congressional committees would have to be either "national * * *

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We are not convinced, however, that an outright transfer of funds from NRSC to a State committee would be equivalent to an "agency" relationship in which the agent, NRSC, controls the funds from start to finish—from raising to spending. In the latter situation the State committee may have no voice in the way funds are spent. Nor is this a difference that is obviously without consequence. When the NRSC pays the piper, it will call the tune. The candidate may have little incentive to communicate with the State committee, preferring to deal with a committee of his colleagues that directs the flow of funds.

If funds were actually transferred to the State committees, on the other hand, the committees would be more likely to maintain an active role throughout the campaign. Even if NRSC attempted to direct how transferred funds were to be spent, the State committees would actually make the day-to-day campaign expenditures and might be able to persuade NRSC that funds should be spent differently than the congressional committee envisioned. As State committees assumed responsibility for campaign disbursements, moreover, candidates might confer more closely with those committees and remain more closely in touch with their local party constituents. Since the structure of the Act suggests that Congress intended to increase the role of State and national committees, not of congressional committees, we find these possible differences to be potentially meaningful.[36]

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Footnote continued—

committees * * * of [a] political party" or subordinate to such a committee. Section 431(14) defines "national committee" in a manner that the parties agree excludes congressional committees. We do not know whether the congressional committees could establish that they are subordinate to the national committees of their parties.

[36]The dissent argues that the same number of dollars will be raised by the NRSC and spent in the same State senatorial campaign, regardless of whether the NRSC is permitted to act as the agent of the State committees, dissenting op. at 9, and that this factor is all that matters in terms of "substance." The dissent thus fails to consider the possible importance of State committee *control* of finances in strengthening

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It would be inappropriate for this court to speculate further about the ways in which transfers of funds might differ from agency agreements. The parties have not argued the validity of funds transfers, but only of agency agreements. Since we find that the plain language of Section 441a(d)(3) precludes the latter,[37] we must reverse the District Court, declare the Commission's failure to act contrary to law, and direct the Commission to conform with this decision forthwith. *See* 2 U.S.C. § 437g(a)(8)(C).

*So ordered.*

WILKEY, *Circuit Judge*, dissenting: Like Chief Judge Wright and Judge Ginsburg, I too have read the statute and base my opinion as to the necessary result in this case on its plain language. Unlike my colleagues, however, I do not approach the task of this court as if we are the first called upon to construe this statute; the issue before us is not our construction of the statute *de novo*, but whether the Commission's interpretation of the statute can be supported on a rational basis so that its conclusion cannot be said to be "contrary to

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Footnote continued—

the influence of the State committees and encouraging candidates to communicate more closely with their State party constituencies. Nor is the dissent even consistent in its claim that the court's decision exalts form over substance. Having argued at length that our opinion will not alter the "substance" of campaign finance, the dissent then proceeds to claim that the result will be more sweeping than even the plaintiffs had "bargained for." *Id.* at 8. The court, the dissent argues, should not upset a method of campaign financing that the NRSC has found to have "some functional advantage." *Id.* at 9. Yet the location of such a "functional advantage" in a senatorial campaign committee, rather than in the national or State committees, is a result that Congress showed no desire to achieve.

[37] Like the Commission, the dissent fails to come to grips with the only real issue in this case: may party organizations effectively rewrite § 441a(d)(3) of the Act to displace State committees and substitute congressional campaign committees in their stead? For the reasons stated in our opinion, the clear answer to this question is "no."

law."[1] Also unlike my colleagues, I reach a result supported by the General Counsel of the Federal Election Commission, the unanimous 6 to 0 vote of the Members of the Commission, and the decision of the District Judge below.[2]

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[1] 2 U.S.C. § 437g(a)(8)(C) (1976) and subsequent amendments.

The statutory standard for judicial review requires the court to overturn a Commission interpretation of its implementing statute which is "contrary to law." *Id.* § 437g(a)(8)(C). The Federal Election Campaign Act delegates to the Commission especially broad discretion to set election law policy and to draw the meaningful distinctions appropriate to definitions under the election law. *E.g.*, 2 U.S.C. § 437c(b)(1), *as amended by* Pub. L. No. 96-187, § 306(b)(1), 93 Stat. 1335 (1979): "The Commission shall administer, seek to obtain compliance with, and *formulate policy* with respect to, this Act," (emphasis added); 2 U.S.C. § 431(14)–(15): "The[se] term[s] . . . mean[] . . . , *as determined by the Commission*" (emphasis added).

[2] *Democratic Senatorial Campaign Committee v. FEC*, No. 80-1903 (D.D.C. 28 Aug. 1980).

The penchant of this court to give no deference whatsoever to the responsible agency's interpretation of its role and basic statute has been noted with acerbity by the Supreme Court in *Vermont Yankee Nuclear Power Corp. v. NRSC*, 435 U.S. 519 (1978) and by commentators, *e.g.*, Scalia, *"Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court,"* 1978 S. CT. REV. 345, 358, 371. Deference to the Commission on new issues like this before a new agency gives the agency the chance it needs to make its own interpretation, because it has the responsibility to make its statute work. *Power Reactor v. Electricians*, 367 U.S. 396, 408 (1961). Deference to the Commission's view on election law policy and what constitutes compliance seems particularly advised in that events occur very quickly in an election year. The Commission is the expert body charged by Congress with the coherent administration of elections and must, therefore, be competent to reach expeditious and equitable judgments drawing reason out of a melange of vaguely consistent election laws obviously adopted by the process of political compromise on this highly charged political field; it is the Commission which is prepared to read the body of election law as a whole. Moreover, the Commission is self-consciously bipartisan. Congress created a Commission, 2 U.S.C. § 437c (1976), which could make sensitive political decisions cognizant of bipartisan exigencies. Courts should tread lightly on these matters of party politics.

## I. STRAIGHT STATUTORY CONSTRUCTION

We start with 2 U.S.C., Ch. 14—Federal Election Campaigns,[3] § 441a, *Limitations on Contributions and Expenditures.* There are *two* subsections—not just one—relevant and decisive in this case.

a. *Dollar limits on contributions.*

. . .

(4) The limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party.

. . .

(d) *Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office.*

. . .

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State Committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

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[3]The Federal Election Campaign Act of 1971 (FECA), Pub. L. No. 92-225, 86 Stat. 3, was amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475, by the Social Security Amendments of 1977, Title V, Sec. 502, Pub. L. No. 95-216, 91 Stat. 1655, and by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339.

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or

(ii) $20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner of any other State, $10,000.

The latter of the two above provisions, (d)(3), fulfills one of the two prime objectives of the Federal Election Campaign Act—to place a limit on overall expenditures in campaigns for federal office. For my colleagues this provision is sufficient unto itself to settle the question before us in this case. For me it is not sufficient, because this section alone does not purport to tell us where the money, whose total amount is limited, is coming from.[4] To find out that we must look back at the first part of § 441a, *Limitations on Contributions and Expenditures*, to the very first subsection: (a) *Dollar limits on contributions*. Subsections (1), (2), and (3) deal with limits on contributions by persons, multi-candidate political committees, and individuals, provisions which are directed to the second principal objective of the FECA, *i.e.*, eliminating undue and corrupting political influence on candidates and office-holders by limiting contributions. The subsections dealing with persons, multi-candidate political committees, and individuals are not relevant to this case, but subsection (a)(4), quoted above, certainly is.

Subsection (a)(4), far from placing any limitation, specifically provides that the prior limitations in (1) and (2) (persons and multi-candidate political committees) "do not apply to

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[4]The majority, maj. op. at 12-16, appears to be singularly concerned with *who* may spend money under FECA rather than from *where* campaign money may lawfully flow. The transfer provision, 2 U.S.C. § 441a(a)(4), indicates strong legislative intent that campaign monies flow freely through a political party's extended network. Plainly, Congress thought to permit the discretionary assignment of funds among a party's component organizations.

transfers between and among political committees which are national, State, district or local committees (including any subordinate committee thereof) of the same political party." As will be discussed more fully under IV below, while there are evils associated with large contributions by persons and multicandidate political committees to candidates for federal office, there are no visible evils associated with the transfer of funds among committees of the same political parties. The contribution limitations as to the original sources have already been applied, and the connection between the recipient federal candidate and the original source of the funds is totally broken and obscured.[5]

So looking again at subsection (d)(3), we might expect that the national committee of each political party, or a state committee of a political party, would gain a substantial amount of contributions from persons generally, and would employ those funds most efficiently to assist the candidates for Senator or Representative in each State as its judgment indicated—but within the overall limit on expenditures as provided by subsection (d)(3). However, in addition to the contributions of persons or other authorized entities, which are limited by §§ 441a(a)(1), (2), and (3), these party national and state committees have an additional source of funds, and that is a transfer of funds from one of the "political committees which are national, State, district, or local committees . . . of the same political party" under subsection (a)(4). These transfers are plainly unlimited in amount, because the funds have been accumulated in obedience to the contribution limits of § 441a-(a) and there is no visible evil in the transfer of funds among political committees of the same party, if both the individual contribution limits and the overall expenditure limits on any campaign race are observed.

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[5] *See* notes 7-18, 25 *infra* & accompanying text. *See also Common Cause v. Schmitt*, Nos. 80-1609 & 80-1754 (D.D.C. 30 Sept. 1980) (three-judge court) at 18 & n. 40.

The Senatorial Campaign Committee and the Congressional Campaign Committees of each major political party have proved to be highly successful fund-raisers. The plaintiff Democratic Senatorial Campaign Committee does not challenge in this suit that under § 441a(a)(4) either a Senatorial Campaign Committee or a Congressional Campaign Committee of either party *can transfer* an unlimited amount of money to either that party's national committee or that party's state committee in one of the individual states, and that the money so transferred can be expended on behalf of that party's candidate for either the Senate or the House in a given state—all within the expenditure limit of (d)(3).

However, for reasons which are not obvious in the record and which are immaterial, the Senatorial and Congressional Campaign Committees of *both* political parties have found it administratively advantageous to make the above-described transfer of funds in an indirect way.[6] Instead of the Senatorial or Congressional Campaign Committee writing its check to the order of the national committee of its party, the Senatorial or Congressional Campaign Committee of both parties has followed the practice of having the national committee *authorize* the Senatorial or Congressional Campaign Committee of its party to make expenditures *as its agent* on behalf of designated candidates for the Senate and the House. Again, such expenditures by a given national committee from all sources must be within the overall limits of subsection (d)(3).

Significantly, and interestingly, this indirect device of appointing the Senatorial or Congressional Campaign Committee as the agent of the *national* committee, a practice followed by both political parties, is *not* challenged by the plaintiff Democratic Senatorial Campaign Committee here. What is challenged is the exact parallel in direct transfer of funds by the authorization of a *state* committee to the Senatorial (or Congressional) Campaign Committee to expend funds on behalf of a designated candidate for the Senate or House of that political

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[6] Counsel for appellant, Democratic Senatorial Campaign Committee, has informed the court that it too is the designated agent of its party's national committee.

party.[7] This delegation of expenditure authority is practiced *only* by the *Republican* Senatorial and Congressional Campaign Committees, but *not* by the *Democratic*. Why this is so we do not know, and it is immaterial to any court decision, because the delegation of authority from the state committee to the Senatorial or Congressional Campaign Committees rests on precisely the same rationale and statutory provisions permitting unlimited transfers as does the delegation of authority from the national committee to the Senatorial or Congressional Campaign Committees, a practice engaged in by *both* political parties.

## II. FORM OVER SUBSTANCE

My colleagues say that we are not called upon here to pass upon a transfer case, that there is actually no writing of a check by the National Republican Senatorial Committee to a state committee on behalf of a Senatorial candidate in that state. This is true. The transfer of funds and the transfer of their political effect do not take place in that way; it is done indirectly as described above by the delegation of authority from the state committee to the Senatorial Committee (or from the national committee, unchallenged here).

The difference is purely one of form, not substance. It makes absolutely no difference in the scheme of control of campaign expenditures and contributions whether the National Republican Senatorial Committee in Washington writes a check and mails it to the state committee in Louisville, Kentucky, to be expended for the benefit of the Republican nominee for the Senate in the State of Kentucky, or, on the other hand, as is now the practice, the state committee in Louisville, Kentucky, writes a letter to the Senatorial Campaign Committee in Washington authorizing that committee to make expenditures on behalf of the same Republican nominee for the Senate in Kentucky. In either event, the funds expended come from the contributions accumulated by the Senatorial Committee in Washington, those contributions having been duly made in accordance with the limitations of § 441a(a), and expended within the overall limitations of § 441a(d)(3).

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[7] *Cf.* Maj. op. at 17-19.

It is precisely because to accede to the view argued for by the plaintiff here and espoused by my colleagues would do nothing but exalt form over substance that the Federal Election Commission very sensibly responded in a requested opinion that such delegation of authorized expenditures to the Senatorial or Congressional Campaign Committee of the same party was lawful within the meaning and purpose of the statute. The FEC stated: "Since funds may be transferred between the congressional campaign and the national committee of the same political party without limitation, it is immaterial as to which committee's funds are being expended under 2 U.S.C. § 441a-(d)(3)."[8] There is simply no sense in prohibiting the letter of authorization being written in Louisville and mailed to Washington, when it is recognized that the statute plainly permits under § 441a(a)(4) a check to be written in Washington and mailed to Louisville to accomplish precisely the same purpose, *i.e.*, spending money accumulated by the National Republican Senatorial Committee on behalf of the Republican candidate for Senator in the State of Kentucky.[9]

According to the majority's view, two things will happen: First, the letters of authorization from the state committees to the National Republican Senatorial Committee will become of no effect and the Senatorial Committee in Washington will immediately start writing checks to each state committee for the amount which it has decided to allocate in support of the Republican Senatorial candidates in those states. Secondly—and this is more than the plaintiffs have asked or bargained for —*both the National Committees of the Republican and Democratic parties* will immediately be required to stop writing letters of authorization to their respective Senatorial and Congressional Campaign Committees in Washington; instead,

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[8] Advisory Opinion, AO 1976-108, *reprinted in* Commission Appendix at 3a, *reprinted in* [1980] Fed. Elec. Camp. Fin. Guide (CCH) ¶5236.

[9] There is no question in this case of limitations on *contributions* under 2 U.S.C. § 441a(h) ($17,500 contribution limit imposed on national and Senatorial Campaign Committees). This case involves only the spending of money in campaigns and applicable *expenditure* limits.

the National Committees of both parties will simply have to arrange the direct transfer of funds from their respective Senatorial and Congressional Campaign Committees, as authorized by § 441a(a)(4), and then the National Committees (instead of the Senatorial or Congressional Campaign Committees) will expend those funds within the limits of subsection (d)(3) on behalf of selected candidates for the Senate and House in the states.

The net result of plaintiff Democratic Committee's position prevailing is that not one dollar less will be spent, not one dollar will be changed from where the members of the national committee, or state committee in consultation with the Senatorial or Congressional Campaign Committees of their respective parties, want the dollar to be expended. All that will happen is that the money will be transferred and administered in a manner which *neither* major political party has found most efficient, but which the Federal Election Commission has held is the exact practical equivalent of the practice of authorized delegation now being followed by both political parties.

An obvious question arises: If the respective committees can transfer and spend the money in precise technical compliance with both relevant subsections of the statute, why do not the committees use this form and achieve the same substance? The record is bare of any explanation of why the various committees have followed the current practice, which dates at least from 1976. Both major parties use the method of their respective National Committees authorizing the Senatorial and Congressional Campaign Committees as agents to make expenditures for candidates within the statutory limits. Only the Republicans have seen fit to have their state committees so work with the National Campaign Committees. There may be advantages of economy of scale in expenditures from one source, of available expertise in creating and placing advertisements, in obtaining media exposure, in obtaining credit during the campaign, etc.; the court can only speculate. All we know is that both parties employ the indirect method of expenditure by authorizing the committees in Washington as agents, that it must have some functional advantage, and that the Democratic

Senatorial Campaign Committee (which does not act as an agent for Democratic *state* committees) has taken the trouble to challenge the National Republican Senatorial Committee's actions as agent for Republican state committees.

## III. ESTABLISHED PRECEDENT–ACTION AND OPINION

While the advantage of what the intervenor Republican Committee is doing is not obvious from the record, the profound–and grossly unfair–disadvantage of the court sustaining this Democratic Committee challenge at this late hour is undeniably clear. The actions challenged were in accord with the precedent established over the lifetime of the practice of delegation by both the national and state committees, which rest on the same rationale.

(1) In 1976 the Republican National Committee (RNC) designated the National Republican Senatorial Committee (NRSC) as its agent to make the expenditures for congressional campaigns permitted under subsection (a)(4) and (d)(3).[10] The Democratic National Committee filed a complaint challenging this indirect method, but withdrew it.[11]

(2) Representative Cleveland requested an advisory opinion on the practice, which was specifically approved in Advisory Opinion 1976-108, cited above.[12]

(3) At this time the FEC was engaged in rulemaking, and produced § 110.7 *Part Committee Expenditure Limitations* (2 U.S.C. § 441a(d)). Regulation § 110.7(a)(4) specifically approves the *national* committee of a party making any

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[10] *See* Brief for Appellee at 3; Appellant's Brief at 20 n.16; Brief in Behalf of Intervenor, Republican National Senatorial Committee at 3-4.

[11] *See* Brief in Behalf of Intervenor, Republican National Senatorial Committee at 4.

[12] *Reprinted in* Brief for Appellee, Commission Appendix at 3a; [1980] Fed. Elec. Camp. Fin. Guide (CCH) ¶5236.

authorized expenditure under § 441a(d) "through any designated agent" in connection with a presidential campaign. No reference was made to a *state* committee acting through an agent, although both national and state committees are authorized to make expenditures by § 441a(d); the explanation offered is that at that time in 1976 no state committee had made any agency designation in either a presidential or a congressional campaign. Furthermore, it was only in 1978, after the regulation was promulgated, that agency designations were made by state committees to the Congressional Committees in campaigns for House and Senate races.[13]

(4) In 1978 several Republican state committees followed the practice begun in 1976 by the RNC and designated the intervenor National Republican Senatorial (or Congressional) Committee as an agent to make expenditures for the benefit of congressional candidates. This was challenged in two complaints. In MUR 780[14] the FEC concluded on 19 January 1979 that the NRSC had not violated 2 U.S.C. § 441a(d) by making § 441a(d) expenditures as agent of *both* the Montana Republican *State* Committee and the Republican *National* Committee. Likewise, in MUR 820 the FEC concluded on 19 June 1979 that there was no violation of § 441a(d) by the NRSC acting as agent of both the RNC and the Alabama Republican Party.[15] The plaintiff here, the Democratic Senatorial Campaign Committee, did not protest or attempt to overturn these FEC rulings until May 1980 with the filing of this complaint before the FEC.

Surely this was amply reassuring precedent for the intervenor NRSC to continue in this campaign year the practice of acting as agent of the RNC and state committees to make expenditures under §§ 441a(a)(4) and (d)(3), a practice which

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[13] *See* Brief in Behalf of Intervenor, Republican National Senatorial Committee at 4.

[14] *See* Commission files, Matter Under Review, MUR 780 (19 Jan. 1979).

[15] *See* Commission files, MUR 820 (19 June 1979).

had been validated and sustained by the FEC against every challenge since 1976. In reliance thereon the intervenor NRSC has entered into contracts for campaign activities, with the media and political suppliers, and with employees to serve during the campaign. These are substantial commitments of millions of dollars, which this court now throws into jeopardy and confusion 30 days before the campaign is to end, in spite of four years of precedential rulings contra by the responsible agency, the FEC, confirmed in this specific case by the FEC General Counsel's opinion, the unanimous 6 to 0 vote of the FEC members, and the decision of the District Court.

One minor point perhaps should be noted at this time. While counsel for the Democratic Senatorial Campaign Committee responded in answer to a direct question from the court at oral argument that the plaintiff was "not challenging transfers in this case," yet it has been suggested that neither the Democratic Senatorial Campaign Committee nor the National Republican Senatorial Committee (nor their respective Congressional Campaign Committees) are "national" committees within the meaning of § 441a(a)(4) authorizing unlimited "transfers between and among committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party." We can assume the disposition of this case, since no party challenges it, that the Senatorial Campaign Committees are within the scope of the "transfer" provision.[16]

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[16] The broad, inclusive scope of the transfer provision, 2 U.S.C. § 441a(a)(4), the compelling need for Commission discretion, and the congressional contemplation of joint "national committee"/"Senatorial Campaign Committee" activity obvious in 2 U.S.C. § 441a(h), all suggest that any committee of a political party, including a party's Senatorial Campaign Committee, would be free to initiate and receive funds transfers under § 441a(a)(4). The Senatorial and Congressional Campaign Committees are identifiable as, and are in fact, part of either the Republican or Democratic parties. *See* 119 CONG. REC. S5194 (daily ed. 3 Apr. 1974) (remarks of Sen. Baker). Furthermore,

(Continued on the following page)

## IV. TWO PRINCIPAL PURPOSES OF THE FEDERAL ELECTION CAMPAIGN LAWS

It is undisputed that two of the principal objectives of reform in the conduct of federal elections were, first, putting some kind of an overall limit on the horrendously escalating cost of political campaigns, and, secondly, eliminating the pernicious influence of the large campaign contributor over the political candidate or political officeholder.[17] These two reform objectives were to be accomplished in three ways: first, overall limits on campaign expenditures in the races for President, the Senate, and the House; secondly, stringent limitations on the individual contributions which could be made by persons and organized entities to individual candidates and special purpose committees;[18] thirdly, a system of full public disclosure of all expenditures and all except the most minor contributions.

When we look at the plain language of the statutory scheme, we see that there are overall limits on the expenditures in campaigns for the Senate and the House under § 441a (d)(3). There is no suggestion whatsoever in the plaintiff's argument or in my colleagues' opinion that the practice challenged here in any way is an attempt to or could evade the

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Footnote continued—

> [t]he conferees also determined that it is appropriate to set a higher limit on contributions from persons to political committees of national political parties in order to allow the political parties to fulfill their unique role in the political process. In this connection, the term "political committee established or maintained by a national political party" includes the Senate and House Campaign Committees.

H. R. REP. NO. 94-1057 (Conf. Rep.), 94th Cong. 2d Sess. 58 (1976) (discussion of 2 U.S.C. §§441a(a)(1)(b)-(2)(B)).

[17] *See Buckley v. Valeo*, 424 U.S. 1, 25-26 (1976) (per curiam).

[18] Controlling campaign contributions, the Supreme Court held in *Buckley v. Valeo*, legitimately suppressed corruption and venal influence by eliminating the possibility of *quid pro quos*.

overall expenditure limitations of subsection (d)(3). It is perfectly clear that whatever funds of the intervenor NRSC, acting as agent of either the Republican National Committee or a state party committee, are expended on behalf of any given Senatorial candidate, those expenditures must be within the overall limits authorized to the RNC or to the state committee, respectively. This is true whether the Senatorial Committee makes the expenditure itself as a result of being designated as an agent of the state or national committee and authorized thereby to make the expenditure, or whether the Senatorial Committee writes a check to either the national committee or the state committee.

Furthermore, accountability for all funds expended on behalf of a given political candidate by any party political committee is placed in the state's party central committee. Regulation § 110.7,[19] *Party committee expenditure limitations (2 U.S.C. 441a(d))* specifically provides under subsection (c)(1): "The State central committee shall be responsible for insuring that the expenditures of the entire party organization are within the limitations, including receiving reports from any subordinate committee making expenditures under paragraph (b) of this section, and filing consolidated reports showing all expenditures in the State with the Commission," The "expenditures under paragraph (b) of this section" refers to the expenditures of "the general election campaign of a candidate for federal office in that state who is affiliated with the party," *i.e.*, a designated Republican or Democratic candidate for the Senate or for the House.

The second principal purpose of campaign reform, limiting contributions in order to eliminate the evil effect of huge contributions influencing candidates or officeholders, is taken care of in § 441a(a), *Dollar limits on contributions.*[20] As was briefly discussed above, after placing specific limits on (1) persons, (2) multi-candidate political committees, and (3) individual aggregate contributions, the Congress came to consider

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[19] 11 C.F.R. § 110.7 (1977).

[20] *See* notes 17-18 *supra* & accompanying text.

the possible and probable "contributions" to be anticipated between political committees of the same political party. These, of course, are not "contributions" in the original sense;[21] they are actually *transfers* of funds which have been received by the respective committees within the contribution limit for individuals and organizations previously set. Hence, the Congress made absolutely clear in § 441a(a)(4) that the limitations on contributions in the above paragraph "do not apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party."

The reason for this Congressional exemption of transfers between political committees of the same party is perfectly obvious: there is no evil to be prevented by barring the free exchange of funds among political committees of the same party. There is no fear of undue influence exerted by a large contributor over the individual candidate or political officeholder, for two reasons: (1) the individual contributions have originally been limited by the contribution limits in the statute; and (2) the political candidate or officeholder does not know who made the contributions to the overall national, state, district, or local committee which generously endows him with funds, or, at least, he does not know who contributed the specific

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[21] Party committees, including Senatorial and Congressional Campaign Committees, it is worth noting, are deemed incapable of making *independent expenditures* which were accorded great protection in *Buckley v. Valeo*, 424 U.S. 1 (1976) and *Common Cause v. Schmitt*, Nos. 80-1609 & 80-1754 (D.D.C. 30 Sept. 1980) (three-judge court). *See* Brief for Appellee at 10 n.5. 2 U.S.C. § 441a(d) is the only statutory authorization for *expenditures* by party political committees. There is no support for an inference that Senatorial and Congressional Campaign Committees were meant by Congress to be excluded from making *any expenditures* at all in connection with campaigns. It makes more sense that these Campaign Committees should share in their parties' overall expenditure limitations.

dollars which the individual candidate receives.[22] And, no matter by whom or by whose agency the expenditures are made, the expenditures on any candidate's behalf must be within the limits of § 441a(d)(3). Since there was no evil to be prevented by imposing a restriction on transfers, Congress very wisely specifically said that there were no limits on transfers; and, the Federal Election Commission, charged with implementing and enforcing the campaign laws, has very wisely and sensibly said, from the start and consistently thereafter, that the practice of designating another committee as an agent and authorizing expenditures of funds by the agent, when the funds could have been directly transferred anyway, is the equivalent of the transfers specifically authorized by the statute.

Not only is there no evil to be prevented by the limitation which the plaintiff Democratic Committee has persuaded my colleagues to write into statute, but there are positive benefits to be gained by allowing the free interchange of funds among political committees of the same party, whether by direct transfers or indirectly by authorizing another committee to act as agent in making the expenditures. A party cannot "unduly influence" its own candidate, but by supplying funds for the individual candidate it may instill in the candidate some sense of party loyalty and party responsibility, which is generally recognized to be a beneficial relationship. Certainly to the extent an individual candidate is beholden to his own political party for a substantial portion of his campaign funds, he is much less vulnerable to individual pressure groups who would sway his vote, for good or evil, on certain critical issues.[23]

It should not be overlooked that the funds raised by the committees referred to in subsection (a)(4), whose funds are

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[22] *See generally Common Cause v. Schmitt*, Nos. 80-1609 & 80-1754 (D.D.C. 30 Sept. 1980) (three-judge court).

[23] As a Congressman, Judge Abner Mikva, presently a member of this court, argued for the benefits of free transferability of party funds. 124 CONG. REC. H2263 (daily ed. 21 March 1978).

to be freely transferred, are funds raised from citizens all over the United States. To that extent they are an amalgamation, an expression of support from small contributors. In that respect they are similar to the funds raised through the federal tax process by the check-off on individual income tax returns, which is an expression of national policy preferring funds to be raised as anonymously and in as widespread a fashion as possible. To the extent that these funds can be used freely in individual Senate and House campaigns, we are implementing a definite national policy. The position urged by the plaintiff here and adopted by Judges Wright and Ginsburg cuts directly contrary to that salutary policy by eliminating the most effective and efficient method chosen.

## V. FIRST AMENDMENT CONSIDERATIONS

It is quite apparent from the lengthy Congressional debates in regard to the federal election laws over a period of years that Congress was quite aware of the fact that, in imposing contribution and expenditure limitations, it was legislating in an area of vital First Amendment concerns. If there was any legislator who was not aware of that, he was surely made aware of it by the Supreme Court's decision in *Buckley v. Valeo*. "The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities."[24]

There is no need to rehash the extensive Supreme Court analysis on the First Amendment grounds in *Buckley*. It is clear that the Court held that construction of the Act must be made in light of First Amendment rights, and so must this court's construction here. It is sufficient to point out that the Supreme Court sustained limitations on individual contributions only because the perceived evil of undue influence by large contributors on candidates and officeholders was sufficient to justify these restrictions. At the same time, the Supreme Court struck down the limitations on individual expenditures on behalf of his own individual candidacy, because the

[24] 424 U.S. 1, 14 (1976).

use of money by an individual is a form of speech protected by the First Amendment, and there could be no evil of undue influence by one man exercising his First Amendment rights.

Similarly, in the case at bar, there is no visible evil in any "undue influence" by a political party on its own nominated candidate for the Senate or House.[25] Hence, there is absolutely no evil to be eliminated by gratuitously imposing a restriction on the free interchange of funds among the political committees of the same political party, so long as those funds are accounted for and the expenditures are controlled by a designated accountable committee within the overall limitations on expenditures for that office. It is illuminating to compare the specific restrictions, which Congress did clearly write into the statute, with the tortuous and convoluted construction which my colleagues find it necessary to engage in to sustain the prohibition against free interchange of funds argued for the plaintiff Democratic Committee.[26] When there is no clear, specific

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[25] *Cf. Common Cause v. Schmitt*, Nos. 80-1609 & 80-1754 (D.D.C. 30 Sept. 1980) (three-judge court) at Part III. A. 4. (political committees, through expenditures rather than contributions, do not pose *quid pro quo* threat).

[26] The First Amendment protects political association as well as political expression. The constitutional right of association explicated in *NAACP v. Alabama*, 357 U.S. 449, 460 (1958), stemmed from the Court's recognition that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." Subsequent decisions have made clear that the First and Fourteenth Amendments guarantee "freedom to associate with others for the common advancement of political beliefs and ideas," a freedom that encompasses "'[*t*]*he right to associate with the political party of one's choice.*'" *Kusper v. Pontikes*, 414 U.S. 51, 56, 67 (1973) quoted in *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975).

*Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (emphasis added). *See also Common Cause v. Schmitt*, Nos. 80-1609 & 80-1754 (D.D.C. 30 Sept. 1980) (three-judge court) at Part III B.

prohibition against the action complained of, the difficulty of finding the rationale to restrict free speech should be proof positive that my colleagues are engaged in an unworthy effort.

Mark this well. No person, no group of persons (committee) needs the *permission* of any Congress or any court to spend money to assist candidates for public office. That is free speech. There can be limitations and regulations as to amounts, methods, publicity, and accountability, but the validity of those limitations will be strictly tested. The limitation must be justified by the evil which the limitation is designed to prevent, just as we test any other limitation on free speech. In this, as in any other area of free speech, the limitation must be precisely spelled out and clearly relevant to prevention of evil.[27] Neither the plaintiff nor my colleagues have even

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[27] I submit that the majority fails to grasp the significance of what the Supreme Court did in *Buckley v. Valeo*, 424 U.S. 1 (1976), in upholding limits on Contributions, but striking down limits on Expenditures. (*See* maj. op. at n. 27.) *Both* are in the First Amendment area. Where contributions are concerned, the evil of the *quid pro quo* is obvious, so the statutory limits are justified. Expenditures are a different matter, for there is no visible corruption when money amplifies free speech; *hence the Court struck down every limitation on Expenditure challenged on First Amendment grounds.* In so doing the Court spoke in terms relevant to the majority's effort to restrict expenditures here:

> "No governmental interest that has been suggested is sufficient to justify the restriction on the quantity of political expression imposed by § 608(c)'s campaign expenditure limitations.
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> . . . .
>
> "The interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions rather than by § 608(c)'s campaign expenditure ceilings." (p.55)
>
> . . . .
>
> "The interest in equalizing the financial resources of candidates competing for federal office is no more convincing a justification for restricting the scope of federal election campaigns."
>
> . . . .

(Continued on following page)

claimed any evil to be prevented by the restriction they would engraft on the statute. Section 441a(d)(3) is no prohibition on

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Footnote continued—

"There is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate.[64]

[64]As an opinion dissenting in part from the decision below noted: "If a senatorial candidate can raise $1 from each voter, what evil is exacerbated by allowing that candidate to use all that money for political communication? I know of none." 171 U.S. App. D.C., at 268, 519 F.2d, at 917 (Tamm, J.)" [in which this writer joined]. (p. 56)

"The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution, it is not the government, but the people—individually as citizens and candidates *and collectively as associations and political committees*—who must retain control over the quantity and range of debate on public issues in a political campaign.

"For these reasons we hold that § 608(c) is constitutionally invalid." (pp. 57-58)

The Court went on to *validate contribution ceilings*, but "[b]y contrast, *the First Amendment requires the invalidation of the Act's independent expenditure ceiling*, § 608(e)(1), its limitation on a candidate's expenditures from his own personal funds, § 608(a), *and its ceilings on overall campaign expenditures*, § 608(c). These provisions place substantial and direct restrictions on the ability of candidates, citizens, *and associations* to engage in protected political expression, restrictions that the First Amendment cannot tolerate." (Emphasis added.) *Id.* at 58-59.

The specific holding of *Buckley* was, of course, as the majority suggests (maj. op. at n. 27), to invalidate the *independent* expenditure limitations, not to rule on expenditures of a political party committee—a ruling which, if made, would have left one point of view in the case at bar bereft of any support whatsoever. But surely the language used by the Court, the rationale of sustaining restrictions *only* where there was an obvious evil to be prevented, is highly relevant to our problem here. *Buckley* confirms that *all* of FECA's campaign "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." 424 U.S. at 14.

the activities of intervenor National Republican Senatorial Committee, but an overall limit on expenditures for federal elective office and a method of accounting utilizing the respective party national and state committees. The only other relevant provision, § 441a(a)(4), authorizes the intervenor NRSC to do directly what it has done indirectly here. In what the Supreme Court has termed "an area of the most fundamental First Amendment activities," this is a shaky foundation for the decision my colleagues stretch to reach.

## APPENDIX B

**Opinion of the United States District Court**

(Filed August 28, 1980)

Civil Action No. 80-1903

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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DEMOCRATIC SENATORIAL
CAMPAIGN COMMITTEE,
*Petitioner,*

v.

FEDERAL ELECTION COMMISSION,
*Respondent.*

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### MEMORANDUM OPINION

This is an action challenging the dismissal by the Federal Election Commission (the Commission) of a complaint alleging violations of the Federal Election Campaign Act of 1971, as amended (2 U.S.C. § 431 *et seq.*), filed by the Democratic Senatorial Campaign Committee against the National Republican Senatorial Committee. Petitioner Democratic Senatorial Campaign Committee (DSCC) seeks a declaration by this Court pursuant to 2 U.S.C. § 437g(a)(8) that the Commission's determination was contrary to law and an order directing the Commission to comply with such declaration within 30 days.

The DSCC is a political committee organized by Democratic Party members specifically to support Democratic candidates in elections for the United States Senate. The National

Republican Senatorial Committee (NRSC) is a political committee organized by Republican Party members specifically to support Republican candidates in elections for the United States Senate.

The administrative complaint involved was filed with the Commission by the DSCC on May 9, 1980, pursuant to 2 U.S.C. § 437g(a)(1). The allegations of the complaint concerned the practice of various state committees of the Republican Party authorizing the NRSC to make expenditures which the state committees were entitled to make in connection with general election campaigns for the United States Senate under 2 U.S.C. § 441a(d). By written agreement, the various state committees had designated the NRSC as their "agent" in 1978 for the purpose of making such expenditures.

The complaint asserted that the NRSC was prohibited by the statute from acting as the agent of the various state Republican Party committees under 2 U.S.C. § 441a(d).

DSCC did not challenge the fact that the NRSC had been designated as the agent of the national committee of the Republican Party in making § 441a(d) expenditures on behalf of Republican senatorial candidates. Rather, it challenged only the ability of the state committees to designate NRSC as their agent in making § 441a(d) expenditures. The matter had been considered and rejected by the Commission in two previous cases; i.e., *Friends of Donald Stewart Committee v. NRSC*, MUR 820, and *National Committee for an Effective Congress v. NRSC*, MUR 780.

Pursuant to 2 U.S.C. § 437g, the Commission, which is vested with exclusive jurisdiction for administration and civil enforcement of the Act, *see* 2 U.S.C. § § 437c(b)(1), 437d(e), gave the NRSC an opportunity to demonstrate that no action should be taken against it by the Commission. NRSC submitted a written response to DSCC's complaint.

On July 11, 1980, the Commission adopted the recommendation of its General Counsel and determined by 6-0 vote

that there was no reason to believe the NRSC had violated the Act. Accordingly, it dismissed the complaint, closed its file in the matter, and so notified complainant DSCC.

Thereafter, on July 30, 1980, DSCC filed a complaint in this Court seeking to have the Commission's determination declared contrary to law. The following day, July 31, 1980, DSCC filed a motion for summary judgment. On August 18, 1980, FEC filed a cross-motion for summary judgment.

As the following discussion will show, there are no genuine issues as to any material facts in this action, and the Commission's action in dismissing petitioner's administrative complaint was not contrary to law. Accordingly, the Commission's cross-motion for summary judgment is granted, and petitioner's motion for summary judgment is denied.

DSCC's principal complaint is that under the agency arrangement engaged in between NRSC and State, when the State has insufficient funds to come up with its two cents per voting age population of the State, the NRSC makes up the difference up to a maximum of four cents: two cents per voting age population through its agency agreement with the National Committee plus two cents per voting age population pursuant to agency agreement with the State committee (plus the $17,500 allowable contribution to a senatorial candidate).

The FEC relied upon 2 U.S.C. § 441a(a)(4) which provides:

> The limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and among political committees which are national, State, district or local committees (including any subordinate committee thereof) of the same political party.

The FEC reasons that this provision authorizes the transfers challenged herein. In the FEC's view, it permits expenditures by the NRSC on behalf of the State committees subject to the express limitation on State committee spending contained in § 441a(d)(3).

In the instant case, the Court finds its scope of review to be a narrow one. It is well settled that courts must accord great deference to the agency below in its administration of the statute with which the agency is charged. *Bell v. Brown*, 181 U.S.App. D.C. 226; 557 F.2d 849 (1977).

Absent a finding that the FEC's determination was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law, its determination must be affirmed. *Hampton v. Federal Election Commission*, [1980] Fed. Elec. Cap. Fin. Guide (CCH) ¶9036 at 50,439-40 (D.D.C. 1977), *aff'd*, No. 77-1546 (D.D. Cir. July 21, 1978) (unpublished opinion). *In re Federal Election Campaign Act Litigation*, 434 F.Supp. 1044, 1046 (D.D.C. 1979). The Court is unable to so find, and the decision below must remain undisturbed. Accordingly, petitioner's motion for summary judgment is denied, respondent's motion for summary judgment is granted, an appropriate order is entered herewith, and the petition is dismissed.

/s/ JUNE L. GREEN

*U.S. District Judge*

**Judgment Entry of the United States District Court**

(Filed August 28, 1980)

Civil Action No. 80-1903

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
*Petitioner,*

v.

FEDERAL ELECTION COMMISSION,
*Respondent.*

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The Court, having fully considered the motion for summary judgment filed by petitioner Democratic Senatorial Campaign Committee and the cross-motion for summary judgment filed by respondent Federal Election Commission, and the Court having heard arguments by both sides, it is by the Court this 28th day of August 1980,

ORDERED that the motion of petitioner Democratic Senatorial Campaign Committee for summary judgment is denied; it is further

ORDERED that the motion of respondent Federal Election Commission for summary judgment is granted in accordance with the Memorandum Opinion filed herein this date; and it is further

ORDERED that this action is dismissed.

/s/ JUNE L. GREEN
*U.S. District Judge*

## APPENDIX C

**The Certification of the Vote of the Federal Election Commission**

**(Dated July 11, 1980)**

**MUR 1234**

**BEFORE THE FEDERAL ELECTION COMMISSION**

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**IN THE MATTER OF**

**NATIONAL REPUBLICAN SENATORIAL COMMITTEE**

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### CERTIFICATION

I, Marjorie W. Emmons, Secretary of the Federal Election Commission, do hereby certify that on July 10, 1980, the Commission decided by a vote of 6-0 to take the following actions regarding MUR 1234:

1. Find NO REASON TO BELIEVE that the National Republican Senatorial Committee violated the Act in making expenditures, under 2 U.S.C. § 441a(d)(3), as agent of both the Republican National Committee and of a Republican State Committee.
2. CLOSE THE FILE in this matter.
3. Send the letters of notification as attached to the First General Counsel's Report dated July 8, 1980.

Voting for this determination were Commissioners Aikens, Friedersdorf, Harris, McGarry, Reiche, and Tiernan.

Attest:

/s/ MARJORIE W. EMMONS
*Secretary to the Commission*

## APPENDIX D

**Judgment Entry of the Court of Appeals for the District of Columbia Circuit**

(Filed October 9, 1980)

No. 80-2074

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1980

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DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
*Appellant,*

v.

FEDERAL ELECTION COMMISSION,
NATIONAL REPUBLICAN SENATORIAL COMMITTEE,
*Intervenor.*

---

Appeal from the United States District Court for the District of Columbia.

Before: WRIGHT, *Chief Judge,* and WILKEY and GINSBURG, *Circuit Judges*

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JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION THEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby reversed and the Commission is directed to conform with this decision forthwith, in

accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court
/s/ GEORGE A. FISHER
*Clerk*

Opinion for the Court per curiam
Dissenting opinion filed by Circuit Judge Wilkey

## APPENDIX E

**Order of the United States Court of Appeals Denying Petition for Rehearing**

(Filed October 11, 1980)

No. 80-2074

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1980

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DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
*Appellant,*

v.

FEDERAL ELECTION COMMISSION,
NATIONAL REPUBLICAN SENATORIAL COMMITTEE,
*Intervenor.*

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Before: WRIGHT, *Chief Judge*, and WILKEY and GINSBURG, *Circuit Judges*

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ORDER

Upon Consideration of intervenor's petition for rehearing and of its application to recall mandate, it is

ORDERED, by the Court, that intervenor's petition and its application are denied.

*Per Curiam*

For the Court:

/s/ GEORGE A. FISHER
*Clerk*

**Order of the United States Court of Appeals Denying Rehearing En Banc**

(Filed October 11, 1980)

No. 80-2074

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1980

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DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
*Appellant,*

v.

FEDERAL ELECTION COMMISSION,
NATIONAL REPUBLICAN SENATORIAL COMMITTEE,
*Intervenor*

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BEFORE: WRIGHT, *Chief Judge*; MCGOWAN, TAMM, ROBINSON, ROBB, WILKEY, WALD, EDWARDS, and GINSBURG, *Circuit Judges*

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ORDER

The suggestion for rehearing *en banc* filed herein by intervenor having been transmitted to the full Court and a majority of the judges in regular active service not having voted in favor thereof, it is

ORDERED, BY THE COURT, *EN BANC*, that intervenor's aforesaid suggestion for rehearing *en banc* is denied.

*Per Curiam*

For the Court:

/s/ GEORGE A. FISHER
*Clerk*